UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

KALVAN KIRKPATRICK,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting Commissioner of the Social Security Administration,

Defendant.

CASE NO. 2:15-cv-1001 JCC-JRC

REPORT AND RECOMMENDATION ON PLAINTIFF'S COMPLAINT

Noting Date: December 11, 2015

This matter has been referred to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR 4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261, 271-72 (1976). This matter has been fully briefed (*see* Dkt. 11, 12, 13).

After considering and reviewing the record, the Court concludes that the ALJ's written decision is supported by substantial evidence in the record as a whole. For example, plaintiff's allegations that he has difficulty being active for more than an hour

each day and is unable to lift a full gallon of milk is inconsistent with his testimony that he daily cares for his child, does housework and mows the lawn with a self-propelled push mower.

Therefore, the ALJ's decision should be affirmed pursuant to sentence four of 42 U.S.C. § 405(g).

BACKGROUND

Plaintiff, KALVAN KIRKPATRICK, was born in 1967 and was 44 years old on the alleged date of disability onset of March 11, 2012 (*see* AR. 174-76, 177-84). Plaintiff has a limited education (*see* AR. 26). Plaintiff has work experience in property maintenance, and as an auto mechanic and lube technician and believes he was terminated from his last job for being too slow with the work (AR. 48-53).

According to the ALJ, plaintiff has at least the severe impairments of "degenerative disc disease and osteoarthritis (20 CFR 404.1520(c))" (AR. 19).

At the time of the hearing, plaintiff was living in a home with his wife and two children (AR. 45-46).

PROCEDURAL HISTORY

Plaintiff's application for disability insurance ("DIB") benefits pursuant to 42 U.S.C. § 423 (Title II) of the Social Security Act was denied initially and following reconsideration (*see* AR. 77-81, 82-87). Plaintiff's requested hearing was held before Administrative Law Judge Virginia M. Robinson ("the ALJ") on November 26, 2013 (*see* AR. 41-75). On February 23, 2013, the ALJ issued a written decision in which the ALJ

concluded that plaintiff was not disabled pursuant to the Social Security Act (*see* AR. 14-31).

On May 4, 2015, the Appeals Council denied plaintiff's request for review, making the written decision by the ALJ the final agency decision subject to judicial review (AR. 1-6). *See* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court seeking judicial review of the ALJ's written decision in June 2015 (*see* Dkt. 3). Defendant filed the sealed administrative record regarding this matter ("AR.") on August 28, 2015 (*see* Dkt. 9).

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether or not the commissioner erred by failing to consider properly the credibility of plaintiff's allegations; and (2) Whether or not the commissioner erred by failing to consider properly the professional opinion of plaintiff's treating physician (*see* Dkt. 11, p. 1).

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

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DISCUSSION

(1) Whether or not the commissioner erred by failing to consider properly the credibility of plaintiff's allegations.

Plaintiff contends that the ALJ erred by failing to credit fully plaintiff's allegations. Defendant contends that there is no error.

If an ALJ rejects the testimony of a claimant once an underlying impairment has been established, the ALJ must support the rejection "by offering specific, clear and convincing reasons for doing so." *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (*citing Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.1993)); *see also Burrell v. Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014) ("There is no conflict in the caselaw, and we reject the government's argument that *Bunnell* excised the "clear and convincing" requirement"); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (*citing Bunnell v. Sullivan*, *supra*, 947 F.2d at 343, 346-47). As with all of the findings by the ALJ, the specific, clear and convincing reasons also must be supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

If the medical evidence in the record is not conclusive, sole responsibility for resolving conflicting testimony and questions of credibility lies with the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1999) (*citing Waters v. Gardner*, 452 F.2d 855, 858 n.7 (9th Cir. 1971) (*Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980)). An ALJ is not "required to believe every allegation of disabling pain" or other non-exertional impairment. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (*citing* 42 U.S.C. §

423(d)(5)(A) (other citations and footnote omitted)). Even if a claimant "has an ailment reasonably expected to produce *some* pain; many medical conditions produce pain not severe enough to preclude gainful employment." *Fair, supra*, 885 F.2d at 603. The ALJ may "draw inferences logically flowing from the evidence." *Sample, supra*, 694 F.2d at 642 (*citing Beane v. Richardson*, 457 F.2d 758 (9th Cir. 1972); *Wade v. Harris*, 509 F. Supp. 19, 20 (N.D. Cal. 1980)). However, an ALJ may not speculate. *See* SSR 86-8, 1986 SSR LEXIS 15 at *22.

As noted by the ALJ, plaintiff "testified that due to his back impairments, he has difficulty being active for more than an hour each day (hearing testimony)" (AR. 22). Plaintiff indicated that "he can only sit in a chair for about five minutes before needing to adjust positions (hearing testimony)" (*id.*). Plaintiff also "stated that he has difficulty picking up a full two-liter bottle soda, and is unable to lift a full gallon of milk (hearing testimony)" (*id.*). Although plaintiff contests the ALJ's interpretation of plaintiff's hearing testimony, the Court concludes that it is appropriate. For example, plaintiff testified that "I get kind of weary just picking up full two liter pop bottles or two, three-liter bottles, picking those up. I don't pick up gallons of milk" (AR. 63).

The ALJ found as follows:

> The limitations that the claimant alleges are inconsistent with his activities of daily living. He is able to attend to all of his activities of daily living independently (internal citation to 6F/2). On a typical day, the claimant wakes up at 7 AM, feeds his 7-year-old son, and then takes him to his bus stop for school (hearing testimony). He does household chores such as vacuuming and washing the dishes (hearing testimony; internal citation to 6F/2). He also does yard work such as mowing the lawn (internal citation to 6F/2). The claimant is able to drive a car to get around, though he states that he can only drive short distances (hearing

> testimony). He also spends time doing things that he enjoys. For example, the claimant enjoys playing golf when he can afford it (hearing testimony). He also enjoys playing with his children (5F/4; hearing testimony). I note that the claimant serves as the primary caregiver for seven-year-old son. The claimant's wife works full-time, and the claimant testified that he is the one that gets his son off to school in the mornings. He also stated that in the summers, he is home with his son all day. His ability to care for himself and a young child indicates a higher level of functioning than the claimant alleges.

(AR. 22-23).

Regarding activities of daily living, the Ninth Circuit repeatedly has "asserted that the mere fact that a plaintiff has carried on certain daily activities . . . . does not in any way detract from her credibility as to her overall disability." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (*quoting Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001)). The Ninth Circuit specified "the two grounds for using daily activities to form the basis of an adverse credibility determination: (1) whether or not they contradict the claimant's other testimony and (2) whether or not the activities of daily living meet "the threshold for transferable work skills." *Orn, supra*, 495 F.3d at 639 (*citing Fair, supra*, 885 F.2d at 603). Here, the ALJ clearly is relying on a finding that plaintiff's activities of daily living contradict his other testimony (*see* AR. 22-23). *See id.* This finding is supported by substantial evidence in the record as a whole.

It is true that an ALJ may not first presume that a claimant conducts his activities of daily living differently than he or she contends and then use that presumption to support an adverse credibility finding. *See* SSR 86-8, 1986 SSR LEXIS 15 at *22 (an ALJ may not speculate); *see also Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (*quoting Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999)).

However, here, even when consideration is given as to how plaintiff testified that he conducts his activities of daily living, the ALJ's finding that they are inconsistent with plaintiff's claims of being totally disabled is supported by substantial evidence in the record as a whole. As noted by the Ninth Circuit, even when the claimant's "activities suggest some difficulty functioning, they may be grounds for discrediting the claimant's testimony to the extent that they contradict claims of a totally debilitating impairment." *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012) (*citing Turner v. Comm'r of Soc. Sec. Admin.*, 613 F. 3d 1217, 1225 (9th Cir. 2010); *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 693 (9th Cir. 2009)).

Here, plaintiff alleged that he can only sit for about five minutes however also testified that he is able to drive a car to get around (AR. 22-23). Although plaintiff contends that he only can drive short distances, the ALJ's inference that not all of plaintiff's driving can be completed in five minutes is an inference "logically flowing from the evidence." *See Sample*, *supra*, 694 F.2d at 642 (*citing Beane*, *supra,* 457 F.2d at 758; *Wade*, *supra,* 509 F. Supp. at 20). In fact, plaintiff himself testified he can drive for 15 minutes at a time (AR. 57). This is inconsistent with his allegation that he could only sit for a maximum of five minutes at a time (AR. 58). Similarly, the ALJ's inference that plaintiff's performance of household chores such as vacuuming and washing the dishes, as well as conducting yard work such as mowing the lawn with a self-propelled push mower is inconsistent with plaintiff's allegations of "a totally debilitating impairment" is reasonable. *See Molina*, *supra*, 674 F.3d at 1113 (*citing Turner*, *supra,* 613 F. 3d at 1225; *Valentine*, *supra,* 574 F.3d at 693). The ALJ's inference that mowing the lawn even for

20 minutes at a time with a self-propelled push mower demonstrates an inconsistency with plaintiff's allegation that he does not have the strength to lift a full gallon of milk is supported by substantial evidence in the record as a whole, as is the inference that vacuuming requires more than the alleged limited strength (*see* AR. 47). Further supporting this inference, the ALJ noted that plaintiff demonstrated "5+/5 strength in both the upper and lower extremities and 5/5 handgrips (internal citation to AR. 362)" (AR. 24).

Regarding the ALJ's reference to plaintiff's playing golf, the Court concludes that plaintiff's testimony in this regard also supports the ALJ's finding regarding an inconsistency between plaintiff's activities of daily living and his allegations of limitations. Plaintiff testified that "every time I go out I have to get a cart because I can't walk the distance and everything to do it" (AR. 47). Plaintiff also testified that "that's what I enjoy doing, but I don't do it much anymore" (AR. 47-48). Although plaintiff also indicated that he had not "played in quite a while," and that he could not ever play golf anymore, the Court concludes that plaintiff's testimony in this regard is inconsistent. The Court also concludes that the ALJ's inference that plaintiff still was playing golf sometimes is supported by plaintiff's testimony that he did not "do it much anymore," and that every time he went out he needed to get a cart, and hence is supported by substantial evidence in the record as a whole (AR. 47-48). It also supports the ALJ's finding that plaintiff's activities of daily living are inconsistent with his allegations of "a totally debilitating [back] impairment" and with his allegation that he only can be active

for an hour at a time. *See Molina, supra,* 674 F.3d at 1113 (*citing Turner*, *supra*, 613 F. 3d at 1225; *Valentine*, *supra*, 574 F.3d at 693).

Although plaintiff contends that it is not clear from the ALJ's decision which allegations of plaintiff are not credible, the Court concludes that based on the ALJ's discussion of plaintiff's hearing testimony and the activities of daily living, as noted by the Court herein, the ALJ's rationale is clear from a review of the decision (*see, e.g.*, AR. 22-23). The reviewing court is "not deprived of [its] faculties for drawing specific and legitimate inferences from the ALJ's opinion." *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989). "Magic words" on the part of an ALJ are not required. *See id.*

For the reasons stated and based on the record as a whole, the Court concludes that the ALJ's finding that plaintiff's activities of daily living are inconsistent with his allegations regarding limitations is a finding based on substantial evidence in the record as a whole.

When failing to credit fully plaintiff's credibility, the ALJ also relied on a finding that plaintiff's allegations are inconsistent with the objective medical evidence (AR. 23-25). Contrary to plaintiff's argument that defendant is defending the ALJ's decision "on grounds that the agency itself did not embrace," (Dkt. 13, p. 4), this reason clearly is provided by the ALJ as she concludes that the medical "records from the alleged onset date through the present are minimal, and fail to document the degree of limitation that the claimant is now alleging" (AR. 23). As noted already, the Court is "not deprived of [its] faculties for drawing specific and legitimate inferences from the ALJ's opinion." *Magallanes*, *supra*, 881 F.2d at 755. This finding by the ALJ also is supported by

substantial evidence in the record as a whole. For example, in early June 2013, plaintiff sought treatment for flare up of his back pain (AR. 23 (*citing* AR. 307)). However, as noted by the ALJ, at that time, plaintiff reported that although "he had suffered from chronic back issues, this condition had been controlled for the past five years" (*id*.). This examination occurred over a year after plaintiff's alleged onset date of disability of March 11, 2012 (AR. 17, 19) and it also is a finding specifically noted by the ALJ (AR. 23). As noted by the ALJ, plaintiff "was given injections and pain medication, and instructed to follow-up in 2 to 3 days if he was not improving (AR. 23 (*citing* AR. 309)). Also as noted by the ALJ, plaintiff "does not appear to have followed up after this appointment" (*id*.).

Similarly, as noted already, contrary to plaintiff's allegation that he could not lift a gallon of milk, the ALJ noted that on examination in July 18, 2013, plaintiff "had 5+/5 strength in both the upper and lower extremities and 5/5 handgrips" (AR. 24 (*citing* AR. 362)). This examination also revealed that plaintiff's muscle "bulk and tone are fair" and that there was "no gross atrophy" (*see id.*). Again, the Court notes that this examination occurred after plaintiff's alleged onset date of disability (*see id.*; *see also* AR. 17, 19). At this examination, the ALJ also noted that plaintiff was able to ambulate in and out of the office without a problem; straight leg raise testing was negative in the seated and supine position; plaintiff's tandem walk was normal; Romberg's was absent; plaintiff station and gait were both normal; and he did not require the use of an assistive device (AR. 24 (*citing* AR. 361-362)). As noted by the ALJ, examination on September 24, 2013 revealed similar results, with stable gate; ability to tip toe walk; full range of motion in

the shoulders with "no muscular atrophy;" 5/5 muscle strength in the biceps, triceps, wrist extensors/flexors and hand intrinsic; no tenderness to palpitation in the upper extremities; and no tenderness to palpitation in the lower extremities with "no muscle atrophy" and 5/5 strength (AR. 24 (*citing* AR. 443-44)).

For the reason stated and based on the record as a whole, the Court concludes that the ALJ's finding that plaintiff's allegations are inconsistent with the objective medical evidence is a finding based on substantial evidence in the record as a whole.

The Court also concludes that this reason, as well as inconsistency between plaintiff's allegations and activities of daily living, provides clear and convincing rationale for the ALJ's failure to credit fully plaintiff's allegations of disabling limitations.

(2) Whether or not the commissioner erred by failing to consider properly the professional opinion of plaintiff's treating physician.

Plaintiff contends that the ALJ erred by failing to credit fully the medical opinion of treating physician, Dr. Marci M. Nelson, M.D. Defendant contends that there is no error.

When an opinion from a treating doctor is contradicted by other medical opinions, the treating doctor's opinion can be rejected "for specific and legitimate reasons that are supported by substantial evidence in the record." *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (*citing Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The medical opinion of Dr. Nelson is contradicted by that of Dr. Daniel V. Phan, M.D., who "opines that the claimant has the

residual functional capacity to perform medium work" (AR. 25 (*citing* AR. 362)). The Court notes that the ALJ found that plaintiff was more limited and suffered from "greater limitations than those opined by Dr. Phan," a finding not contested by plaintiff (*id.*).

Dr. Nelson treated plaintiff for several years and provided her opinion regarding plaintiff's condition (*see* AR. 438-44). The ALJ gave "great weight" to a portion of her opinion, finding that "it is supported by the history of the MRI results showing some degeneration in the claimant's back, as well as the treatment notes indicating he suffers from chronic pain" (AR. 25). However, the ALJ found that "Dr. Nelson goes on to opine that the claimant is unable to work, but she does not assess specific functional imitations" (*id.* (*citing* AR. 438)). This finding is supported by substantial evidence in the record as a whole. The ALJ also found that Dr. Nelson's opinion is inconsistent with plaintiff's "own statements, [which demonstrate that] he is clearly able to do some house and yard work, can care for his child, and can tend to his self-care" (*id.*). As already discussed, *see supra*, section 1, the Court concludes that the ALJ's finding that plaintiff's activities of daily living are inconsistent with his allegations of total disability is a finding based on substantial evidence in the record as a whole. The Court also concludes that this rationale entails a legitimate reason for failing to credit fully the opinion of total disability by Dr. Nelson.

CONCLUSION

Based on the stated reasons, and the relevant record, the undersigned recommends that this matter be **AFFIRMED**. **JUDGMENT** should be for **DEFENDANT** and the case should be closed.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on December 11**,** 2015, as noted in the caption.

Dated this 16th day of November, 2015.

J. Richard Creatura
United States Magistrate Judge